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SUPREME COURT, U. S.
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No. 422

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

SERVICE TRUCKING COMPANY, INC., *Appellant*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*

APPELLANT'S BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

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BRIEF OPPOSING MOTIONS TO AFFIRM

Pursuant to Rule 16, Paragraph 1(c), of the Rules of this Court, Service Trucking Company, Inc. submits this its Brief Opposing the Motions of the appellees, United States of America and Interstate Commerce Commission, Kent Freight Lines, Inc., Preston Trucking Company, Inc., and Victor-Lynn Lines, to affirm the judgment of the District Court.

APPELLEES' CONTENTIONS

The United States and the Interstate Commerce Commission by joint motion and Kent Freight Lines, Inc., Preston Trucking Company, Inc. and Victor Lynn

Lines, Inc., by separate joint motion, move this Court to affirm the action of the United States District Court for the District of Maryland. Both motions assert that this appeal does not present any substantial question warranting plenary consideration by this Court. The contentions underlying appellees' motions may be fairly summarized and expressed as follows:

1. The District Court's action is consistent with the doctrines expressed in *Service Storage and Transfer Co., Inc.* v. *Virginia*, 359 U.S. 717.

2. Without regard to the literal terms of a motor carrier's interstate certificate, the Commission is "warranted" in equating proof that the interstate routes followed between points in the same state are not a "logical and normal operation" with subterfuge to evade state regulation, and in forbidding such operations.

3. The Interstate Commerce Commission is empowered "to look beyond the literal language of * * * certificates" if in the Commission's judgment use thereof by the holder constitutes a subterfuge to evade state regulation.

ARGUMENT

Neither the government nor the private appellees make any real effort to meet the important issues raised by this Appeal. They seek to avoid coming to grips with those questions that have plagued the Commission and the Courts, including this Court, for more than a decade. The points urged by appellees in support of their request for affirmance hereinafter are shown to be based on erroneous interpretation of case authority.

A. This Court's Decision in Service Storage & Transfer Co., Inc. v. Virginia Has Not "Made It Clear" That the Commission May Modify a Certificate Under the Guise of Interpretation

Service Storage, supra, did not "make it clear" that the Commission's authority to interpret its certificates included the power to modify an unrestricted franchise so as to prohibit operations allegedly conducted as "a subterfuge to escape state regulation". This Court there held (1) that where a certificate *on its face* covers the operations, state prosecution based on allegations that interstate operations constitute a subterfuge must be deferred until the Interstate Commerce Commission has interpreted the certificate (see 359 U.S. at 171); (2) that if the certificate, as interpreted, authorizes the questioned operations, state sanctions (permitted in the absence of federal certification)[1] against "subterfuges" are foreclosed; and (3) that in the interests of procedural simplicity states should complain directly to the Interstate Commerce Commission where it is believed that the "operation is not bona fide interstate but is merely a subterfuge to escape the [state's] "jurisdiction". That this Court had no more in mind than application of the conventional tests of certificate interpretation is made clear by the observation:

> ". . . the possibility of a multitude of interpretations of the same federal certificate by several states will be avoided and a uniform administration of the Act achieved." (p. 179)

This Court's admonition to the States to complain first to the Interstate Commerce Commission merely serves to emphasize the fact that the Motor Carrier Act (Section 204(c)) specifically imparts standing to states in complaint proceedings, including the right to

[1] Eichholz v. Public Service Commission, 306 U.S. 268.

institute proceedings involving certificate interpretation questions. However, the State's standing to complain should not be confused with or automatically substituted for proof of unauthorized operation. Proof of illegality must precede relief. This Court's use of the expressions "direct evidence of bad faith" and "abuse of certificate" in *Service Storage* obviously apply to situations where the challenged operations have not been conducted in accordance with a fair interpretation of the literal terms of the certificate, and imply that state prosecution without prior Interstate Commerce Commission interpretation is permissible in such instances. In *Service Storage,* part of the dispositive evidence of "good faith", according to this Court, was that the carrier "enjoyed certificates from the Interstate Commerce Commission authorizing its operations." (at p. 176)

B. The "Logical and Normal Route" or the "Sound Business Purpose" Tests of Interpretation Are Arbitrary, Unrealistic and Contrary to Requirements of Specificity and Certainty in Motor Carrier Certificates and Necessarily Lead to Partial Revocation in Violation of Section 212(a) of the Interstate Commerce Act

The "normal, regular, or usual route" test was first referred to in *Eichholz* v. *Public Service Commission,* 306 U.S. 268, 271. In the circumstances of that case where the carrier held no interstate franchise it was appropriate for Missouri to impose sanctions against operations that were conducted across states lines to defeat state regulation. Since *Eichholz,* economic regulation of interstate commerce by motor vehicle including certification has been delegated exclusively to the federal government and appellant has a certificate literally authorizing the questioned operations.

In this connection it is important to note that this Court in *Eichholz,* (at page 274) stated:

> "We may assume that Congress could regulate interstate transportation of the sort here in question, whatever the motive of those engaging in it."

As stated, Congress has subjected interstate commerce by motor carrier to regulation by the Interstate Commerce Commission, and the latter has specifically authorized the appellant (following extended proceedings) to conduct the questioned operations without restriction (see *Service Trucking Company Ext. of Operations, Eastern Shore,* 46 M.C.C. 465). Had the Commission intended to limit appellants authority through the imposition of a restriction, it could have easily done so. (*Atlantic Freight Lines, Inc., Petition for Declaratory Order,* 51 M.C.C. 175, 188-189.[2])

The "logical and normal route test" and the "sound business purpose test" are shown by a recent decision of the Commission (in which it reversed the Examiner) not only to be too vague and uncertain to satisfy the specificity requirements of Section 208 but also to be impossible of fair application. In its place the Commission has substituted an even more vague and uncertain test which, unlike the former test which has some ascertainable roots in economic theory, incorpo-

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[2] Curiously enough, the Commission as a consequence of the extensive litigation in this field, is now imposing specific restrictions to prohibit operations of the type in question, see *Evans—Purchase—Pocono Motor Freight Term., Inc.,* 97 M.C.C. 144 (Jan. 11, 1965), and *Long Transportation Co.—Purchase—La Grou,* 97 M.C.C. 631 (Aug. 30, 1965). In both cases the Commission, for the expressly stated purpose of eliminating future litigation, imposed the following restriction: "operations under the unified rights shall be restricted against the transportation of traffic having both origin and final destination at points in Pennsylvania".

rates subjective good faith, and other considerations. In *Rock Island Motor Transit Co.* v. *Watson-Wilson Transportation System, Inc.*, 99 M.C.C. 303 (served August 13, 1965) complaint was made by Iowa intrastate competitors of Watson-Wilson that the latter's use of terminals at Omaha, Nebraska and Rock Island, Illinois as consolidation points for less than truckload traffic transported between points in Iowa, without intrastate authority, constituted an "evasion to escape Iowa intrastate regulation." Aside from the happenstance of location of the terminals, which were built after interstate certification, there was no economic justification for an interstate, rather than intrastate, routing. The Examiner found that "[the] terminals [at Omaha and Rock Island] could just as easily be established at Council Bluffs and Davenport [Iowa] with resulting economies in operation if intrastate authority could be obtained from the Iowa Commission" (Recommended Report and Order, Docket No. MC-C-2972, served November 7, 1962 at page 12), and concluded that "the act of Watson in situating its terminal in an adjacent state does not convert a route otherwise characterized by circuity and backhauling into a normal and natural route" (at page 14), and that the operations constituted a "subterfuge". The Commission disagreed on the grounds that the majority of Iowa-to-Iowa shipments "move over fairly direct routes" (99 M.C.C. at 311); that much of such traffic moves over the same routes as multi-state traffic (Ibid); of the "small size" of Watson's all-Iowa, as compared multi-state, operations ("considerably less than 3 percent") (Id. at 312); that there was no evidence that the operations "begun more than a generation ago, were devised as a subterfuge", both the Iowa Commission and, presumably, Watson's competitors knowing

of operations and not challenging them "despite the opportunity presented to the Iowa Commission as a party opposing Watson's 'grandfather' application before the Interstate Commerce Commission to question the *bona fides* of the operations." (Ibid) The Commission concedes the unfairness of a strictly-applied economic justification test, in terms reflecting the policy basis behind the strict construction of Section 212(a) of the Act:

> ". . . There being no evidence to the contrary, we can only assume that the operation was apparently condoned by all concerned for many years and allowed to grow gradually to what it is at present. Since it does not appear that it was instituted as a subterfuge or fostered as one, we have considerable doubt that with such a background it could gradually grow to be one, regardless of how its efficiency at a particular moment years later would compare with the efficiency of direct operation. *In any event, bearing in mind that comparative efficiency is subject to considerable fluctuation with changes in such things as roads, equipment, methods, labor expense and other costs, competition, traffic volume, and other factors,*[3] it would seem that as long as the matter of comparative efficiency presents a reasonably close question, the issue of lawfulness should not be decided on the basis of comparative efficiency alone." (At p. 316)

> ". . . As suggested by [the applicable court decisions] the Commission and the courts, in most of

[3] The most significant lesson to be drawn from *Rock Island Motor, supra* is that the Commission has now compelled *itself* to consider external variables in construing certificates rather than considering the language of the certificate alone. That policy or doctrine if perpetuated and extended, contrary to statute and precedent, will require certificate holders to prove and reprove, again and again, public convenience and necessity. Such a result cannot be tolerated.

the cases involving an alleged subterfuge, will compare the efficiency of the direct and the circuitous routes. Such a comparison is not the sole test of good faith. *Service Storage & Transfer Co., Inc.* v. *Virginia, supra,* at page 176. However, it is usually the best indicator of the carrier's *intent* because without some compelling reason, a carrier would normally seek and use the most efficient routes available." (at p. 307)

C. The Commission Has Neither Express Nor Implied Power to Interpret Unambiguous Certificates Other Than Through Giving Effect to the Literal Terms Thereof

The government, obviously conceding that appellant's certificate literally authorizes the questioned operations, gratuitously (and rather surprisingly) asserts: "the Commission [is empowered] to look beyond the literal language of such certificate" (p. 4).

If the foregoing quotation is adopted by this Court as an acceptable canon of certificate construction, the prevailing interpretative rules (historically applied by the Commission and the courts) that (1) "operating rights must be construed according to their terms"[4] and that (2) limitations upon authorized operations in certificates must be specific and not left to be implied[5] can no longer obtain.

CONCLUSION

Almost seven years ago (Oct. 13, 1958) this Court granted certiorari in *Service Storage & Transfer, supra,* to determine whether the Commonwealth of Virginia could ignore the literal terms of a federal fran-

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[4] *C & E Trucking Corp.*, 88 M.C.C. 391, 393.

[5] *Atlantic Freight Lines, Inc.—Petition for Declaratory Order,* 51 M.C.C. 175, 188-9.

chise and prosecute the holder thereof for allegedly violating provisions of State law. It is assumed that certiorari was there granted also for the purpose of resolving with finality the continuing controversy with respect to the interstate-intrastate questions springing from the language of certificates issued by the Interstate Commerce Commission. It was there held, inter alia, that where "the certificate *on its face* covers the whole operation" the state was powerless to interfere with the operations of the federally franchised carrier.

One of the questions here is whether the Commission *itself* is bound by the literal terms of the certificate involved. In the government's motion to affirm, it is said the Commission may ignore the plain meaning of the language contained in the certificate. That contention must be rejected unless we are to confer on the Interstate Commerce Commission powers of revocation and modification expressly withheld in Section 212(a) of the Act as construed and applied by this Court in *U. S. v. Seatrain,* 329 U.S. 424.

This case, as well as a number of others,[6] makes manifest the fact that the law remains unsettled. Moreover, as evidenced by the Commission's recent decision in *Watson-Wilson, supra,* fair, consistent and uniform application of the vague standards of interpretation expressed in *Hudson Transportation Co.* v. *U. S.,* 219 F. Supp. 43, cannot be achieved by the Commission

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[6] See *Hudson Transport Co.* v. *U. S.*, 219 F. Supp. 43 (D. N.J., 1963) (in which similar operations by other carriers were involved); *Jones Motor Co., Inc.* v. *United States,* 218 F. Supp. 133 (D. Pa., 1963) (ditto); *Rock Island Motor Transit Co.* v. *Watson-Wilson Transportation System, Inc., supra; Evans—Purchase—Pocono Motor Freight Term., Inc. supra* n. 2; *Long Transportation Co.—Purchase—La Grau, supra* n. 2.

in proceedings involving certificate interpretation, and certificate holders will continue to be exposed to harassing litigation either before the Commission or the Courts. If the circumstances presented to this Court in *Service Storage & Transfer, supra,* justified the grant of certiorari, it appears clear that the present controversy justifies the noting of probable jurisdiction so as to permit plenary consideration of the important questions involved.

Respectfully submitted,

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